

D.P.U. 90-DS-47

Adjudicatory hearing in the matter of possible violation of General Laws Chapter 82, Section 40
J.E. Guertin Co., Inc.

APPEARANCES: Joseph E. Guertin
 J.E. Guertin Co., Inc.
 280 Irving Street
 Framingham, Massachusetts 01701
 PRO SE
 Respondent

I. INTRODUCTION

On August 8, 1990, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to J.E. Guertin Co., Inc. ("Respondent"). In the NOPV, the Division stated that it had reason to believe that the Respondent performed excavations on April 20, 1990 at a location adjacent to 39 Ash Street, Hopkinton Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions causing damage to an underground gas main pipeline operated by Commonwealth Gas Company ("ComGas" or "Company").

The NOPV informed the Respondent that it had the right to appear before a Division hearing officer in an informal conference on September 11, 1990, at the Department's offices. The NOPV also stated that the Respondent could submit a written reply by September 11, 1990, instead of appearing at the hearing.

On September 6, 1990, the Respondent answered by letter and denied that it had violated the Dig-Safe Law. The Division answered in a letter dated March 12, 1991, confirming the conclusions of the NOPV. The Respondent was dissatisfied with the informal decision and requested an adjudicatory hearing before the Department. After due notice, an adjudicatory hearing was held on July 17, 1991, pursuant to 220 C.M.R. 99.00 et seq.

The Division presented two witnesses, Henry Cappuccio, an investigator for the Department, and Paul W. Pouliot, superintendent of technical services for ComGas. The Division offered the following exhibits as evidence: the damage report and Dig-Safe request (Exh. Div.-1); the NOPV (Exh. Div.-2); the Respondent's reply to the NOPV (Exh. Div.-3); the informal

decision (Exh. Div.-4); the Respondent's letter requesting an adjudicatory hearing (Exh. Div.-5); a photograph of the site (Exh. Div.-6); and a map of the area (Exh. Div.-7). The Department moved these exhibits into evidence. Joseph E. Guertin testified for the Respondent. The Respondent offered no exhibits.

II. SUMMARY OF FACTS

The Division received a report of a Dig-Safe violation from ComGas which indicated that the Respondent damaged a two-inch intermediate pressure plastic main on April 20, 1990, adjacent to 39 Ash Street, Hopkinton (Exh. Div.-1). The NOPV alleged that the Respondent failed to exercise reasonable precaution to avoid damage to an underground utility (Exh. Div.-2). The Respondent's project consisted of excavation and installation of telephone poles (Tr. at 13-14; Exh. Div.-1).

In support of the Division's allegations, Mr. Pouliot stated that in response to the Respondent's Dig-Safe call, ComGas marked its facilities at the excavation site on existing telephone poles (Tr. at 16; Exh. Div.-6). Mr. Pouliot noted that the gas main in the area would have been located within an 18-inch leeway on each side of the of the Company's markings (Tr. at 20-21). In addition, Mr. Pouliot noted that working conditions for the Respondent in the area would have been difficult due to a culvert (id. at 24). Given the nearness of the main to the site, Mr. Pouliot asserted that hand-digging, rather than use of an augering machine, would have been required in order to exercise reasonable precaution to avoid damage (id. at 24-25).

Mr. Guertin stated that he felt the Respondent excavated safely by moving boundary stones out of the area of excavation, and excavating in an area the Respondent thought was two

feet away from the gas pipe (id. at 54). He further stated that initially, he attempted to locate the pipe by hand-digging, but determined that hand-digging to a depth of three or four feet would be unproductive (id. at 45). Mr. Guertin also stated that the markings provided by ComGas of its facilities in the area were inadequate because they were not specific enough to have put the Respondent on notice of the exact location of the main (id. at 36-37). Mr. Guertin also noted that the terra tape, an underground six-inch wide yellow tape cautioning excavators of the proximity of the main, was never seen by his work crew (id. at 44). Therefore, Mr. Guertin concluded, reasonable precautions were exercised by the Respondent and it should not be found to have violated the Dig-Safe law (id. at 5).

III. STANDARD OF REVIEW

G.L. c. 82, § 40, states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to any substantial weakening of structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc. v. Bay State Gas Co., D.P.U. 89-DS-15 (1990); Petricca Construction Company v. Berkshire Gas Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co. v. Boston Gas Company, D.P.U. 88-DS-45 (1990). However in Fed. Corp., hand-digging to

locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992). In cases where large machinery may be used for excavation, excavators should take possible factors such as grade changes due to weather into account before estimating the actual location of marked facilities and excavated with large excavating equipment. Amorello & Sons v. Commonwealth Gas Company D.P.U. 89-DS-61, pp. 4-5 (1990) (certain external factors might cause Company markings to be slightly inaccurate). The Department has held that excavators must take external factors into account when initially searching for underground facilities. Id. Further, in situations where markings are clear, it is the excavator's responsibility to be cognizant of the risks involved in excavating and adopt an excavating method that is reasonable given the circumstances. Mahoney, supra.

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. See Fiore & Zenone v. Bay State Gas Company, D.P.U. 88-DS-10 (1993); Fed. Corp. supra, at 5-6. In addition, the mere fact that a utility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro v. Boston Gas Company, D.P.U. 91-DS-4 (1992);

Fed. Corp. v. Commonwealth Electric Company, D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc. v. Colonial Gas Company, D.P.U. 88-DS-7 (1990).

However, the Department has found that where there is material evidence to support an inference of a lack of reasonable care, failure on the part of the excavator to provide evidence to negate that allegation will lead to a finding that the excavator violated the Dig-Safe Law.

Northern Foundations supra, at 4.

IV. ANALYSIS AND FINDINGS

The Respondent has acknowledged that it caused damage to the ComGas service using an auguring machine at the Ash Street site. The Respondent stated that he attempted to dig by hand to expose the main before using the auguring machine, but determined that this effort to hand-dig was unproductive.

The weight of the evidence presented in this case demonstrates that the site was clearly marked. In addition, it was possible for the excavator to expose the main by hand-digging. In fact, the Respondent began to hand-dig to expose the main. However, the Respondent did not provide any support for his statement that hand-digging was unproductive. Therefore, the Department finds that the use of an auguring machine by the Respondent in this instance did not constitute the exercise of reasonable precautions. Accordingly, the Department finds that the Respondent violated the Dig-Safe Law, and that a civil penalty of \$500 is justified as this is a repeat violation by the Respondent.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That the J.E. Guertin Co., Inc. violated the Dig-Safe Law when it failed to exercise reasonable precautions to prevent damage to an underground utility during an excavation at Ash Street, Framingham on April 20, 1990; and it is

ORDERED: That J.E. Guertin Co., Inc. shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, made payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order.

By Order of the Department,